SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 51

UNITED STATES OF AMERICA, *Petitioner,*

vs.

HENRY DEBROW

No. 52

UNITED STATES OF AMERICA, *Petitioner,*

vs.

JAMES H. WILKINSON

No. 53

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ROY F. BRASHIER

No. 54

UNITED STATES OF AMERICA, *Petitioner,*

vs.

CURTIS ROGERS

No. 55

UNITED STATES OF AMERICA, *Petitioner,*

vs.

FORREST B. JACKSON

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF

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BRIEF FOR THE RESPONDENTS

Question Presented

The government leaves out important elements in its statement of the issues. The question presented is more accurately stated as follows:

> "Whether a perjury indictment is subject to dismissal because of its failure to allege the identity of the person who administered the oath either by *naming him or giving the office held or the authority possessed by*

him, when the "tribunal" *is not a court of justice* but a Senate sub-committee; and when the indictment does not charge that the "tribunal" had authority to administer the oath.

Statement

The indictment (R. 5, Br. 4) [1] charges merely:

> "The defendant herein, having duly taken an oath before a competent tribunal, to-wit: A sub-committee of the Senate Committee on Expenditures . . . , a duly created and authorized sub-committee of the United States Senate . . . inquiring in a *matter* then and there pending before the said sub-committee in which a law of the United States *authorizes that an oath be administered* . . .

The only authority referred to as far as an oath is concerned relates solely to the "matter" then pending. The indictment states that it was the kind of matter in which the law authorizes an oath to "be administered".

The indictment does not essay to mention by what authority the *tribunal* could administer the oath nor the identity of the person charged with administering the oath, either by giving his name or the office held by him and does not charge that the person had authority to administer the oath.

The heart of the opinion of the District Court is contained in this language (R. 13):

> "Almost from the beginning of the republic, such a statute has been a part of our law and my thought is that in its enactment, Congress was saying that no matter how many technical matters may be left out of an indictment for perjury, you must give the defendant the name and the authority of the person who ad-

[1] Record references are, unless otherwise indicated, to the record in No. 51, *United States* v. *Debrow*, and the brief of the United States will be referred to by the abbreviation BR., unless stated. All emphasis, in quoted statements, is supplied by us, unless otherwise shown.

ministered the oath. I think this was merely the recognition by the legislative branch of the government of the justice of this and the necessity for it, if defendants were to have a fair chance to know what they were charged with . . ."

"I think what they [Congress] meant to say was that the principle is so thoroughly embedded in our law that it is not necessary any longer to have it in the statutes . . ."

And the pith of the decision of the Court of Appeals for the Fifth Circuit [2] is contained in these words:

"But despite its minimum requirements, this statute plainly required that the indictment should 'set forth the substance of the offense charged upon the defendant . . . and by what court and before whom the oath was taken, averring such court or person to have competent authority to administer the same . . . ' It may not, therefore, be rightly said that its repeal destroyed the requirements which formed the basis of the Hilliard decision. But regardless of this statute and its repeal it still remains a fundamental requirement that every essential element of the crime sought to be charged must be stated in the indictment and so stated that the defendant from the allegation of the indictment may understand what he is called upon to defend. This the Sixth Amendment of the Federal Constitution requires . . .

"But where the statute itself omits an essential element of the offense or includes it only by implication the indictment must descend to particulars and charge every constituent ingredient of which the crime is composed . . .

"The indictments under review do not allege an offense in the words of the statute . . . Rule 7(c) requires that an indictment shall contain a *definite* written statement of the *essential facts*, constituting the offense charged and the paramount provisions of the

[2] Record 29-30, 203 F(2) 699, 701-2.

Sixth Amendment are 'that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation.' We think that it is essential to inform the accused by whom it is charged that he was sworn, either by disclosing the name of the person administering the oath, or his official capacity, and that he was in fact possessed of the requisite authority. These are matters of substance which affect the substantial rights of the accused. It is apparent to us as it was to the Supreme Court that there can be no conviction of perjury 'unless the oath in regard to which the perjury was charged was taken before an officer of some kind having authority to administer the oath.' "[3]

The brief filed on behalf of the United States does not meet the impact or deal with the questions discussed in this language from the opinions below. Nor does the government's brief make the concessions contained in the dissenting opinion of Judge Rives. While relying heavily upon that opinion, as will be demonstrated, *infra*, the government seeks to apply a rigid rule that an indictment in the language of the statute is always sufficient; while the dissent[4] concedes, under authorities cited, that this rule does not control "where the words of the statute do not contain all of the essential elements of the offense". The government contends categorically that the omitted facts may be supplied by a bill of particulars, while the dissent[5] concedes, under authorities cited, that "a bill of particulars can not be used to cure an indictment fatally defective . . . , but it may be employed to discover all pertinent details, everything but the 'essential facts'."

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[3] Emphasis not supplied. The reference is to *United States* v. *Hall*, 131 U. S. 50, 9 Supreme Court 663, 33 L. Ed., 97.

[4] R. 23, 203 F(2) 703.

[5] *Ib.*

Nor does the government deal with the serious question of whether anything but courts of justice are embraced within the term "tribunal" as used in 18 U. S. C. 1621 or with the manifest difference between oaths administered by courts of justice and those administered, under the authority of more than seventy statutes, by the multitude of commissions, boards and individuals.

Nor does the government point out any statutory authority at all for the administering of an oath by a Senate sub-committee as an entity nor advert to the fact that the indictment does not state that the Senate Committee had authority to administer the oath.

The dissenting opinion of Judge Rives recognizes that the sole authority for administering oaths before a Senate Committee is conferred by 2 U. S. C. A. 191 (R. 25) and that such authority is conferred on the individual senators by U. S. C. 191. The dissenting judge felt that the word "duly" supplied the inference that some individual senator administered the oath. The government does not discuss that important question at all, contenting itself with an effort to sustain the indictment as having been taken *before* a "tribunal"; while the dissenting judge obviously sought to sustain the indictment under the alternative provision of the statute, "officer or person."

A full development of the questions involved in a decision of the case before the Court requires, therefore, that Respondents deal not only with the questions mentioned in the government's brief, but also with those the brief has omitted to mention.

ARGUMENT

I

The Indictment Does Not State the Essential Elements of the Offense

A. *The Essential Ingredients of Perjury*

The essential ingredients of perjury include an oath administered by a person having authority to administer it, and a willful statement concerning a material fact contrary to such oath, 18 U. S. C. 1621. That these are minimum ingredients of the crime of perjury has been accepted since the foundation of the Republic, and has never been questioned in an appellate court prior to these proceedings. No reported case from an appellate court has upheld an indictment which failed to charge those essential facts. The history of the development of our jurisprudence shows that the necessity for so charging is deeply embedded in the law.

1. *At Common Law*

This Court held in *United States* v. *Curtis*, 107 U. S. 671, 27 L. Ed., 534, that perjury can not be charged at common law or under federal statutes based on "an oath before one who has no legal authority to administer oaths of a public nature, or before one who, although authorized to administer some kinds of oaths, but not the one which is brought in question."

In addition to those ingredients listed as essential, *supra*, the common law required the prosecutor "to set out in the indictment the title of the cause in which the witness was sworn and testified, the record and all of the pleadings therein, thus disclosing jurisdiction and the issue, as a guide to the determination of the question whether the testimony of the witness charged to be false were material. The com-

mission of the officer before whom the oath was taken was also set out". *Danaher* v. *United States* (Eighth Circuit) 39 F.(2) 325, 326. To eliminate the exhibiting of so voluminous a record, Congress dealt with the subject by statute.

2. *Common Law as Abridged by Statute*

By the Crimes Act of April 30, 1790, Congress mitigated the rigors of the common law rule by adopting the English statute, 23 Geo. II, Chapter 11; *Markham* v. *United States*, 160 U. S. 319, 324, 40 L. Ed., 441, 443. This statute was carried as Rev. Stat. 5396, 18 U. S. C. 558, and remained, as originally passed, a part of the Criminal Code until the recodification of 1948.

That statute accepted and recognized the requirements of the common law that the indictment should set forth, ". . . by what court and *before whom the oath was taken, averring such court or person to have competent authority to administer the same* . . .": and effected reforms with respect to two features of the common law requirements. The first of these made it possible for the government to set forth "the substance of the offense charged upon the defendant". The *Markham* case quotes Chitty's Criminal Law and other authorities (160 U. S. 324-5) holding that the gist of this feature of this reform was that it made it possible to charge that the false swearing was about a material matter without setting forth the detailed records from which its materiality might be gleaned.

The other reform embraced in the remedial statute relieved the government from bringing forward with its indictment the entire record of the proceeding in which the defendant had testified, this being the excluding language: ". . . without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or in equity, or any affidavit, deposi-

tion, or certificate, other than as hereinabove stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed". Chiefly in these two particulars did the statute essay to abridge common law requirements with respect to perjury indictments.

3. *Decisions of the Courts*

Beginning with this Court's decision in 1895 in the *Markham* case, every appellate court which has spoken on the subject has approved the thesis that an indictment must set forth the identity of the person administering the oath and his authority. The authority to administer the oath may be charged either in words or by naming the office held so that the court may reach its own judgment as to authority.

The indictment charged Markham with having taken "a solemn oath before G. C. Lumas, then and there a special examiner of the Pension Bureau of the United States, and then and there a competent officer and having lawful authority to administer said oath" and this Court held it to be adequate.

In *United States* v. *Hall*, 131 U. S. 50, 33 L. Ed., 97, the Court discussed at length the statutory character of oaths and persons who could administer them. It adverted to the fact that "The statutes are full of such partial and special enactments about Notaries Public, Commissioners of the Circuit Courts, Clerks of the Courts, and various others by whom oaths may be administered", and reached the conclusion quoted by the court below that, "It can hardly be supposed that a defendant indicted for perjury can be held to be guilty, unless the oath in regard to which the perjury is charged was taken before an officer of some kind having due authority to administer the oath."

The Court of the Fifth Circuit held that it was necessary to show before whom the oath was taken, and that the officer had authority to administer it in *Hilliard* v. *United States*, 24 F(2) 99. The Court of Appeals of the Eighth Circuit, in *Danaher* v. *United States*, 39 F(2) 325, reversed a conviction because the indictment, though naming the individual administering the oath (H. D. Irwin), did not sufficiently describe his status as United States Commissioner.

The Court of Appeals of the Tenth Circuit, in *Travis* v. *United States*, 123 F(2) 268, approved an indictment only because it set forth, not only the court in which the oath was taken, giving the number and style of the case, but also "set forth the name and official capacity of the person who administered the oath, charged that he was authorized by law to administer it . . ."

The Court of the Ninth Circuit, in *United States* v. *Bickford*, 168 F(2) 26, sustained a perjury indictment charging false swearing in a District Court only when the indictment charged that the false swearing took place after the defendant had "taken an oath as a witness before the said District Court which was administered by the Clerk of said Court . . ."

And the Court of the Third Circuit has held to be material "The averment that an oath has been administered and the averment of the one administering it." See *Levy* v. *United States*, 271 Fed. 942 and cf. *United States* v. *Doshen*, 133 F(2) 757.

Not a single reported case from an appellate court, whether federal or state,[6] has ever held the contrary.

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[6] The state decisions are entirely in accord with the federal cases. See, e.g., *Paxton* v. *Walters*, 72 Ariz. 120, 231 P. 2d 458 (1951); *State* v. *Broshears*, 18 Ariz. 356, 161 P. 873 (1916); *Adkinson* v. *State*, 59 Fla. 1, 51 So. 818 (1910); *Campbell* v. *State*, 92 Fla. 775, 109 So. 809 (1926); *Craft* v. *State*, 42 Fla. 567, 29 So. 418 (1900); *State ex rel. Reed* v. *Blitch*, 97 Fla. 260, 120 So. 355 (1929); *Walker* v. *State*, 119 Fla. 240, 161 So.

The treatise writers are equally in accord with this consistent body of authority.[6a]

The significant point of this array of authority is that the Government is not able to point to a single case in a federal or state appellate court where the issue has been raised and where the court has held it is not necessary for the indictment to show on its face the identity in any form of the party administering the oath.

We have found cases sustaining indictments which did not name the person administering the oath but at least described him by the office held by him, such as the clerk of the court, election inspector, foreman of a grand jury, etc., thus permitting the defendant and the court to inspect the statutes and ascertain that an officer so described has or lacks authority to administer the oath.[7]

And this, of course, is all that the *Bickford* case means.

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278 (1935); *Wilds* v. *State*, 79 Fla. 575, 84 So. 664 (1920); *Wilson* v. *State*, 115 Ga. 206, 41 S.E. 696, 90 Am. St. Rep. 104 (1902); *State* v. *Gross*, 175 Ind. 597, 95 N.E. 117 (1911); *State* v. *Biedermann*, 342 Mo. 957, 119 S.W. 2d 270 (1938); *State* v. *Thothos*, 147 Mo. App. 596, 126 S.W. 797 (1910); *State* v. *Pray*, 64 Nev. 179, 179 P. 2d 449 (1947); *State* v. *Woolridge*, 45 Ore. 389, 78 P. 333 (1904); *Green* v. *State*, 86 Tex. Cr. R. 556, 217 S.W. 1043 (1920); *State* v. *McCone*, 59 Vt. 117, 7 A. 406 (1887); *State* v. *Epstein*, 138 Wash. 18, 244 P. 388 (1926).

[6a] 70 C.J.S. 506-508; 124 Am. St. 663; 41 Amer. Jur. 23; Bishop, New Criminal Procedure, Vol. III, Sec. 914; Wharton, Criminal Pleading and Practice, 9th Ed., Sec. 151, pp. 102-103 (1899).

[7] See, e.g., Clerk of the court: *U.S.* v. *Bickford*, 168 F. 2d 26 (C.C.A. 9, 1948); *State* v. *Harter*, 131 Iowa 199, 108 N.W. 232 (1906); Deputy clerk of court: *Masterson* v. *State*, 144 Ind. 240, 43 N.E. 138 (1896); *State* v. *Townley*, 67 Ohio St. 21, 93 Am. St. Rep. 636, 65 N.E. 149 (1902); Trial court: *Beavers* v. *State*, 124 Ark. 38, 186 S.W. 300 (1916); Foreman of grand jury: *Kinniard* v. *Commonwealth*, 233 Ky. 347, 25 S.W. 2d 744 (1930); *Harris* v. *Commonwealth*, 233 Ky. 198, 25 S.W. 2d 369 (1930); *Clower* v. *State*, 151 Ark. 389, 236 S.W. 265 (1922); Referee in bankruptcy: *Pawley* v. *U. S.*, 47 F. 2d 1024 (C.C.A. 9, 1931); Assessor of named township: *State* v. *Cunningham*, 66 Iowa 94, 23 N.W. 280 (1885); Election inspector: *State* v. *Hopper*, 133 Ind. 460, 32 N.E. 878 (1892); Receiver of land office: *U. S.* v. *Eddy*, 134 Fed. 114 (C.C., D. Mont., 1905); Notary public: *State* v. *Eisenstein*, 10 N.J. Super. 497, 77 A. 2d 63 (1950).

There the indictment specified that the oath had been administered by the clerk of the court and the court held that it would take judicial notice of the powers of its own clerk. The *Bickford* case is in accord with the consistent body of authority which we have cited. It cannot be taken for the proposition seemingly urged by the Government that it is not even necessary to describe in any fashion the person who administered the oath. The heavy reliance placed upon the *Bickford* case by the Government is accordingly without basis.

B. *Meaning of Word "Tribunal" as Used in The Statute*

The most logical assumption is that the word "tribunal" as used in 18 U. S. C. 1621 means a court of justice. Webster's Universities Dictionary, Unabridged thus defines the word at page 1831:

> "[*Tribunal*, a platform on which the magistrates sat, from *tribunus*, a tribune, who administered justice].
>
> "1. The seat of a judge; the bench on which a judge and his associates sit for administering justice.
>
> "2. A court of justice; as, the Supreme Court is the highest tribunal."

Similar language is found in Black's Law Dictionary, Third Edition, page 1756:

> "*Tribunal*, the seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise. See *Foster v. Worcester*, 16 Pick. (Mass.) 81."

The meaning of the word seems to have been presented for decision to only one federal court, the District Court of the District of Columbia, Holtzoff, Judge, who used the following language in *United States v. Meyers, et al*, 75 F.

Supp. 486, 487, affirmed 171 F(2) 800, cert. den. 336 U. S. 912:

> "The court has considerable doubt whether a congressional committee is a tribunal, because the word 'tribunal' implies an officer or body having authority to adjudicate matters. But . . . it is not necessary to determine whether a congressional committee is a tribunal, because the statute . . . includes an oath taken before an officer or any other person authorized to administer oaths. The indictment alleges that *the oath in this instance was administered by Honorable Homer Ferguson, a member of the United States Senate, as chairman of a sub-committee.* He was certainly an officer or person authorized to administer oaths. The indictment contains allegations that the sub-committee had authority to examine witnesses under oath." (Emphasis supplied.)

It seems clear that the indictment in the *Meyers* case was sustained only because the charge was brought within the alternative language of the statute, the "officer or person" portion. It is manifest that Judge Holtzoff thought that the mere charge that the oath was taken before the Senate Committee would not have been adequate.

It is clear also that Judge Rives based his dissent (R. 25) solely on the provisions of the "officer or person" alternative of the statute. Here is his language:

> "So far as authority is concerned, any United States Senator, a member of the sub-committee, had authority to administer oaths to witnesses, 2 U. S. C. A. 191 . . . Under the holding in *United States* v. *Bickford*, 168 F(2) 26, the sufficiency of an averment that, 'the oath was administered by some senator, a member of the sub-committee', without naming him, could not be debated. The word 'duly' carried that same meaning. In all probability the defendants knew which senator acted."

That the word "tribunal" has primary reference to courts of justice is confirmed by the language of Section 5396, Rev. Stat. (18 U. S. C. 1940 Edition, 558) quoted at page 3 of the government's brief. This statute was passed in aid of prosecutions under 10 U. S. C. 1621 and constitutes a clear acceptance by Congress of the thesis that the word refers only to courts of justice:

> "In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and *by what court* and before whom the oath was taken, averring *such court* or person to have competent authority to administer the same . . ."

Reason and Logic Demonstrate That "Tribunal" Means Only Courts of Justice.

Courts have inherent power at common law to cause oaths to be administered *before* them. The rule is thus announced in 39 Am. Jur., page 496:

> "It is fundamental that every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction. Therefore, it is not necessary that there be a statute empowering the courts to administer oaths in the trial of cases. The power is implied in the jurisdiction to try cases and to receive the testimony of witnesses under oath. The judge himself may administer an oath, or he may direct anyone in his presence, in open court, to administer it, and the oath will be valid. Inasmuch as an oath derives its sanction and validity from the circumstance that it is duly administered in open court with the approval and under the control of the judge presiding, it is not necessary that the person who thus administers it be a legally appointed officer of the court."

Of course, this common law rule is subject to the fact that oaths in Federal matters can be administered only as

specifically authorized by statute. The quotation is made to exemplify the well recognized principle that all presumptions are indulged in favor of the regularity of acts of courts of justice of general jurisdiction. Certainly, no one would have the hardihood to argue that either the quoted language or the principle would warrant any such presumption with respect to commissions or other bodies of limited statutory jurisdiction.

A court of justice has permanent status and situs. A Senate subcommittee has neither. A Senate committee is both transitory and ambulatory. A court of justice belongs to the ages; a Senate sub-committee to the whims of the passing moment.

A defendant called upon to investigate an indictment for false swearing before a court knows exactly where to go and whom to approach to ascertain the details of person and place with respect to the supposed oath. A defendant called upon to answer an indictment for false swearing before a sub-committee, unless given the name of the person administering the oath, would be placed under severe handicap in making his investigation. The objection of respondents is not captious in any degree, but goes to the very basis of the mechanics of defending charges of crime.

A Multitude of Federal Oath-Givers

An examination of the Federal statutes which does not claim to be complete turns up seventy-one separate sections of U. S. C. A. which confer the authority to administer oath.* In most instances, each statute confers the author-

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* The following references are to U. S. C. A.: Title 2, Sec. 23 and 24; Title 5, Sec. 16(a), 18, 19, 92, 92(a), 93, 93(a), 97, 137 Supp.), 365, 498 (Supp.) 521, 634, 780, 1006 (Supp.); Title 7, Sec. 420; Title 8, Sec. 207(f) and 455; Title 10, Sec. 1586; Title 11, Sec. 66; Title 14, Sec. 26 and 27; Title 15, Sec. 49, 77(h), 77(s), 77(uuu), 80(b-9); Title 16, Sec. 454, 656, 825(f); Title 18, Sec. 6(c) and 4004; Title 19, Sec. 1333, 1486, 1509; Title

ity on a large number of persons. These authorizations cover expense accounts, registration of aliens, investigations in federal prisons and by custom officers, post office inspectors and the like, hearings before the Civil Service Commission, panels of the Labor Board and like groups and a field of activities of immense breadth and scope. Such a situation as this, then relatively simple, caused this Court to emphasize in *United States* v. *Curtis*, *supra*, that an indictment must show clearly that the person essaying to administer an oath had the statutory authority to administer that particular oath.

A large number of the statutes enumerated relate to oaths before multiple persons engaged in the particular matter in hand. These include such bodies as the Civil Service Commission, Securities and Exchange Commission, Committee on Government Reorganization, and include the manifold groups which go out from the seat of government conducting hearings in connection with the intricate problems and relationships of the Federal government.

Is each of those a "tribunal" within the scope of 18 U. S. C. 1621? Would it be sufficient for an indictment to charge a defendant with having sworn falsely "before" one of those congregations of persons? The question answers itself. It is manifest that the "competent tribunal" portion of the statute does not cover those wide-spread activities. They are covered by the other alternative of the statute, "officer or person". The oath is administered in every instance by an individual given authority to administer it by Federal statute. One seeking to charge a crime under such

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22, Sec. 270; Title 25, Sec. 33 and 376; Title 26, Sec. 1114, 3614, 3632, 3654, 3965, 5010; Title 28, Rule 43, Sec. 459, 548, 637, 792; Title 29, Sec. 161 and 195; Title 31, Sec. 117 and 230; Title 32, Sec. 94; Title 34, Sec. 1200—Article 69; Title 38, Sec. 131; Title 39, Sec. 704; Title 42, Sec. 272; Title 43, Sec. 75 and 1117; Title 45, Sec. 154 and 157; Title 46, Sec. 239 and 826; Title 48, Sec. 31 and 199; Title 50, app. Sec. 922(a), 1822(a) 1931.

a statute is bound to give the name of the office and to show that the person named had authority to administer that particular oath.

The present indictment does not charge that the tribunal had any authority to administer the oath, and does not name either the officer or the person charged with having given it; and it does not set forth that the oath was administered with authority or the source of that authority.

The tendency to draw a line between oaths in judicial proceedings and those in non-judicial proceedings is well established and is based on good reason. Corpus Juris Secundum thus treats of it in Vol. 70, p. 508:

> "Ordinarily an indictment or information for perjury or false swearing should show by whom the oath was administered, but the name of the officer administering it need not be alleged where the offense was committed in a judicial proceeding."

While that line is clearly drawn, the court is not required, in this case, to hold that the word "tribunal" in the statute embraces only Courts of Justice. It is sufficient to recognize that 18 U. S. C. 1621 provides for two classes of perjury prosecutions: those based upon false swearing in a tribunal of such character that it is sufficient that the oath be administered "before" it; and those based upon false swearing in a proceeding before one person or a group of persons wherein the statute provides only for the administering of the oath by a designated officer or person.

2 U. S. C. 191 belongs in the latter category,—and it is conceded that it is the only statute authorizing the oath involved here. This statute confers oath-giving powers only on the individual members of Congressional Committees. Even if it be assumed that Congress could have provided that an oath administered "before" a congres-

sional committee was sufficient, the answer is that Congress did not choose to do so; but chose rather to vest the power to administer the oath solely in its individual members.

It should be emphasized that a decision recognizing the above would not tend to weaken the perjury statute or make more difficult the drawing of indictments under it. The addition to the present indictment of the simple statement that the oath was administered by a named member of the committee having authority to administer it would have insured its adequacy while, at the same time, giving the defendant information vital to his defense and guaranteed to him by the Constitution.

C. *Indictment in the Language of the Statute is Not Sufficient*

The government relies heavily on the rule, mistakenly claimed to be of universal application, that ordinarily it is sufficient to charge a crime in the language of the statute. Both opinions in the court below point out that this rule does not apply here because the statute does not spell out all of the essential elements of the offense.

This Court has stated that rule so clearly and so many times that it has become axiomatic. Here is the way the Court expressed the rule in *United States* v. *Carll*, 105 U. S. 611:

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature does not dispense with the necessity of alleging in the in-

dictment all the facts necessary to bring the case within that intent."

In *Armour Packing Company* v. *United States*, 209 U. S. 56, very much the same thing was said:

> "Authorities are cited to the proposition that, in statutory offenses, every element must be distinctly charged and alleged. This court has frequently had occasion to hold that the accused is entitled to know the nature and cause of the accusation against him . . . so that it may be decided as to their sufficiency in law to support a conviction. . . . And it is true that it is not always sufficient to charge statutory offenses in the language of the statute, and where the offense includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars."

To those cases should be added *United States* v. *Simmons*, 96 U. S. 360, *Cochran* v. *United States*, 157 U. S. 286, *United States* v. *Hess*, 124 U. S. 483, *Evans* v. *United States*, 153 U. S. 584, *United States* v. *Cruikshank*, 92 U. S. 542, and a number of other decisions referred to elsewhere in this brief.

Moreover, it is clear, as pointed out by the opinion in the court below, that the language of the statute was not followed by the indictment now before the Court.

D. *The Cases Cited by the Government Are Not Convincing*

No case cited by the government tends to sustain the thesis that a perjury indictment is good which does not charge that the "tribunal" had authority to administer the oath or to have the oath administered before it, and does not identify the person alleged to have administered the oath either by giving his name or the office held by him, and does not charge that such person had authority to

administer the oath. A glance at two or three of the cases relied on by the government will suffice to show this.

In the *Bickford* case, *supra*, the indictment charged that the oath was taken before the United States District Court and was "administered by the clerk of said court . . . ". There, the prosecution was before a court having inherent power to cause the witness to be sworn and the indictment went further and charged that the oath was administered by the clerk of the court. Judicial notice supplied the name of the clerk and the statute spelled out his authority.

It would be a work of supererogation to point out that none of these important factors are present here. The fact that the government is forced to rely on the *Bickford* case shows how barren has been its search for supporting authority.

United States v. *Polakoff*, 112 Fed. 888 has no tendency to support the government's contention here. The charge there involved was the impeding and influencing of an officer. It was a crime to impede or influence *any officer*. The crime was completely charged when the indictment set out that the defendant had influenced a government officer. His identity was not a matter of essence. Not so here. Every officer can not administer an oath. It was necessary to identify the officer so that the court could examine the statutes and determine whether he had authority to administer an oath. The identity of the officer here is, therefore, essential.

II

The Sixth Amendment Requires That Every Essential Ingredient of Perjury Be Charged in the Indictment

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions the accused shall * * * be informed of the nature and cause of the accusation."

The content of this provision has been made clear by the cases as including a number of elements, most clearly expressed in *U. S. v. Cruikshank*, 92 U. S. 542, 558:*

> "The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, *second, to inform the court of the facts alleged, so that it may decide whether they are sufficient to law to support a conviction, if one should be had.*" (Emphasis supplied.)

Chief Justice Marshall made the same point in *The Hoppet v. U. S.*, 7 Cranch 389, 394-395, declaring as reasons for the rule that—

> "the accusation on which the prosecution is founded should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced . . .";
>
> "1. That the party accused may know against what charge to direct his defense.
>
> "2. That the court may see with judicial eyes that the fact alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense. * * *"

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* See in accord: *U. S. v. Hess*, 124 U. S. 483, 487; *Brenner v. U. S.*, 287 F. 636, 640 (C.C.A. 2, 1922); *Kaufman v. U. S.*, 282 F. 776 (C.C.A. 3, 1922), cert. den. 260 U. S. 735; *U. S. v. Winnick*, 151 F. 2d 56 (C.C.A. 7, 1945); *Harper v. U. S.*, 143 F. 2d 795 (C.C.A. 8, 1944); *Fontana v. U. S.*, 262 F. 283, 286 (C.C.A. 8, 1919); *Goldberg v. U. S.*, 277 F. 211 (C.C.A. 8, 1921); *Buck v. U. S.*, 277 F. 220 (C.C.A. 8, 1921); *Weisman v. U. S.*, 277 F. 221 (C.C.A. 8, 1921), cert. den. 258 U. S. 618; *Elder v. U. S.*, 142 F. 2d 199 (C.C.A. 9, 1944); *Carter v. U. S.*, 142 F. 2d 199 (C.C.A. 9, 1944); *U. S. v. Ferranti*, 59 F. Supp. 1003 (D.C., N.J., 1944); *U. S. v. Armour & Co.*, 48 F. Supp. 801 (D.C. Okla., 1943); *U. S. v. Allied Chemical & Dye Corp.*, 42 F. Supp. 425; *U. S. v. Olmstead*, 5 F. 2d 712, 714 (D.C. Wash., 1925); *U. S. v. Greenbaum*, 252 F. 259 (D.C., Mich., 1918); Cooley's Blackstone, 4th Ed., Bk. IV, p. 306 (1899); 42 C.J.S. 836.

It will be observed in the Government's brief that whenever it deals with the function of an indictment it refers only to the first of such objects as set forth in the *Cruikshank* and *Hoppet* cases, *supra*, namely, adequate notice of the charge against the accused and prevention of double jeopardy. It studiously ignores the second and equally important object of an indictment, namely, to permit the court to determine on the face of the indictment whether the facts alleged "are sufficient in law to support a conviction, if one should be had".

The right of an individual to have *the court determine as a matter of law* whether the facts alleged constitute a crime is not a right to be lightly dismissed. It is of the essence of the underlying historical basis for the Sixth Amendment that persons must be safeguarded from being harassed for "pretended offenses".[10] As this Court held in *Adams* v. *U. S.*, 317 U. S. 269—

> ". . . procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty, or property'."

In perjury prosecutions one of the sharpest issues frequently surrounds the authority of the person to administer the oath. That was the issue in *U. S.* v. *Curtis*, *U. S.* v. *Hall*, *Markham* v. *U. S.*, *Hilliard* v. *U. S.*, *Danaher* v. *U. S.*, *Travis* v. *U. S.*, *Levy* v. *U. S.*, *and U. S.* v. *Doshen*, all *supra*. For, as the Court of Appeals for the Third Circuit pointed out in the *Doshen* case, *supra*:

> "An oath taken before an officer who has no legal authority to administer it cannot serve as the basis of an indictment for perjury. * * * This Court will

[10] See Declaration of Independence.

> not draw inferences with respect to the nature of the investigation. A defendant in a criminal case is entitled to an indictment unequivocally setting forth the elements of the crime with which he is charged." (133 F. 2d at pp. 758 and 760.)

The indictments in the instant cases completely eliminate that question as a legal issue to be tested on the face of the indictment by the simple device of not mentioning the matter.

A demurrer, or a motion to dismiss in the nature of a demurrer,[11] is a substantive right, not a procedural technicality. It is deep rooted in Anglo-American law as a method by which both the accused and the court can escape the expense and harassment of trial by determining, in advance of the trial, whether the indictment does, in fact, charge an offense for which the accused can be brought to trial. The importance of the right to challenge a pleading or indictment by demurrer is well indicated at 71 C. J. S. 426:

> "A demurrer is not a mere procedural nicety, but is a precise instrument for the final determination on the merits of justiciability under pertinent rules of law of an asserted cause of action or defense."

The Government attempts to approach this matter of the identity and authority of the person administering the oath as one of "insignificant detail"; and alleges that the identity of the person administering the oath may be obtained by a bill of particulars. The difficulty with the Government's argument is that the authority of the person who administered the oath goes to the very essence of the crime. Matter in a bill of particulars can neither buttress an insufficient indictment, nor be used as part of a motion to dismiss an

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[11] Rule 12a, Rules of Criminal Procedure.

indictment for insufficiency.[12] Upon the Government's theory, the defendant could never in advance of the trial raise an issue of law as to the authority of the person who allegedly administered the oath. It would not appear in the indictment; and if it appeared in a bill of particulars, could not be used as a basis for attacking the indictment. And as the defendant would be barred, so would the Court be prevented from testing upon the fact of the indictment one of the most decisive legal questions involved in perjury prosecutions.

The suggestion by the Government raises a further constitutional question. The Fifth Amendment contains the clear mandate that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." The Government's proposal, if adopted, would mean that an essential averment of an indictment had been provided by the prosecutor, rather than by the grand jury under oath, and would squarely reverse the holding in *Ex Parte Bain*, 121 U.S. 1. Cf., *U.S.* v. *Norris*, 281 U.S. 610, 622; *U.S.* v. *Fawcett*, 115 F. 2d 764, 766 (C. C. A. 3, 1940); and see 132 A. L. R. 404.

The Government further contends that, in any event, because the oath was taken before a "tribunal" which had authority to administer the oath, "the particular person who administered the oath for the tribunal becomes an insignificant detail, particularly where, as here, the com-

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[12] See: *Dunlop* v. *U. S.*, 165 U. S. 486, 491; *U. S.* v. *Comyns*, 248 U. S. 349, 353; *Floren* v. *U. S.*, 186 F. 961, 964, 108 C.C.A. 577; *Local 56 of Internat'l. Fishermen* v. *U. S.*, 177 F. 2d 320, 326 (C.C.A. 9, 1949); *U. S.* v. *Lynch*, 11 F. 2d 208 (D.C. La., 1926); *U. S.* v. *McKay*, 45 F. Supp. 1007 (D. C. Mich., 1942). Of course, only matters not involving essential elements of the crime charged may be supplied by a bill of particulars. *Hood* v. *U. S.*, 23 F. 2d 472 (C.C.A. 8, 1927), cert. den., 277 U. S. 458. Cf., 42 C.J.S. 1101-1102, 1222; Joyce on Indictments, 2d Ed., Sec. 326, p. 363. This is conceded by Judge Rives in his dissent in the present case.

petency and authority of the tribunal to administer oaths *through its members* is well established."

The confusion here is patent. While concededly the Senate subcommittee has the authority to interrogate witnesses under oath, and while concededly a United States Senator would have authority to administer the oath, nothing in the indictment suggests that it was, in fact, a Senator, rather than any of the coterie which normally surrounds a Senate committee, who actually administered the oath. Possibly, counsel for the committee, or a secretary to the committee, undertook this function. On this, the indictment is completely silent.

It is thoroughly acceptable, as in the *Bickford* case, *supra*, for the court, from the *fact* alleged that the clerk administered the oath, to take judicial notice that the clerk had authority to administer it. A statute book would give the answer as to such authority. But here, what is the *fact* from which it can be ascertained that the oath was properly administered? Is it merely that the defendant appeared before a subcommittee? The missing link in the Government's reasoning is that there is no allegation at all that a member of the subcommittee did, in fact, administer the oath. Thus, a statute book will tell the court the unchallenged fact that a United States Senator can administer the oath, but will utterly fail to answer the real question herein: Did he do so in this particular case?

The full answer to the Government's argument on this point is found in what this Court said in *U.S.* v. *Ross*, 92 U.S. 281, 283:[13]

> "These seem to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They

[13] See also: *Nations* v. *U. S.*, 52 F. 2d 97, 105 (C.C.A. 8, 1931); *Wesson* v. *U. S.*, 172 F. 2d 931, 936 (C.C.A. 8, 1949).

are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain."

Furthermore, the Government, pointing to the statute, says that all that is required is that the defendant shall have taken an "oath" before a competent "tribunal" and that since the indictment charges that an oath was duly taken, that is sufficient. But an oath is not "taken" unless administered by a person having authority so to do. No amount of swearing before a person not authorized to take an oath can form the basis of a perjury prosecution. The statute in the precise language has always been held to require the setting forth of the identity of the person who actually administered the oath so that it may be ascertained whether an "oath" was, in fact, "taken".

And the word "duly" on which the Government places such heavy weight is, of course, purely conclusory in nature and affords no basis for factual determination that an oath was, in fact, administered."

In sum, then, the net effect of the indictments in the cases herein is to remove from each defendant and from the court any possibility of testing on the face of the indictment the authority of the person to administer the oath. Since, as we have pointed out above, one of the decisive functions of the indictment is to permit both the court and the defendant to put to test whether every element of the

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[14] The word "duly" "imports but a conclusion relating only to the formalities observed or nonobserved, and tenders no issue." 26 C.J.S. 586. And see *James A. Hearn & Son* v. *U. S.*, 8 F. Supp. 608, 609, 80 Ct. Cl. 260 (1934); *General Talking Pictures Corp.* v. *Hyatt*, 114 Utah 362, 199 P. 2d 147, 149 (1948); *Velson* v. *Green*, 64 N.Y.S. 2d 845, 847 (1946); *Jones* v. *Alan Porter Lee, Inc.*, 259 App. Div. 114, 18 N.Y.S. 2d 231, 232 (1940).

crime is charged, and since the authority of the person to administer the oath is concededly an essential element of the crime, the indictments, if sustained, would seriously breach the protections guaranteed by the Sixth Amendment.

III

Indictment May Not Proceed by Presumption or Implication

The government, in the court below, called upon three presumptions or conclusions to rescue the indictment from dismissal. The dissenting opinion embraces all three, and the government now asks this Court to follow the dissent and reject the main opinion:

1. From the averment of a "competent tribunal," this Court is asked to conclude that the defendant could be sworn by anyone at all, so long as the swearing was "before" the "tribunal."

2. From the use of the adverb "duly," the Court is asked to imply that the swearing was done by a senator who was a member of the sub-committee.

3. From the fact that the grand jury indicted him, the Court is called upon to presume that "in all probability, the defendant knew which senator acted."

It is not enough that the "tribunal" be competent, that is, legally organized so as to be empowered to summon witnesses, hold hearings and receive testimony. Cf. *Chrisoffel* v. *United States*, 338 U. S. 84. The tribunal must have authority to swear the witness or its authority must be such as to invest the act of swearing "before" it with legality, regardless of the person administering the oath or whether he is possessed of independent authority. The indictment does not charge that the tribunal was cloaked with any authority at all to swear a witness and no statute is pointed out conferring such power on the

tribunal. The conclusion of the pleader does not save the indictment.

The dissent which the government asks this Court to follow candidly relies on the word "duly" to supply the essential ingredients of perjury:

> "Further it [the indictment] charges that the oath was 'duly' taken (a fact not noted by my brothers). . . . So far as authority is concerned, any United States Senator, a member of the sub-committee had authority to administer oaths to witnesses. . . . The word 'duly' carried that same meaning."

On the basis of the government's argument thus accepted and epitomized by the dissenting judge, this Court is asked to *imply* that "duly" carries into this indictment the averment of these essential *facts* not otherwise mentioned in it: Having been given the oath by Senator ——, a member of said sub-committee, having authority to administer the same.

Presumably from the fact that the defendant has been indicted by the grand jury, this Court is asked to fill in the name of the Senator in the foregoing quotation on the ground, argued by the government and adopted by the dissent, that "in all probability, the defendants knew which senator acted."

If the presumption of innocence and lack of knowledge on the part of the defendants is to be laid aside, one could, with equal logic, speculate that the defendants probably knew the identity of the tribunal and also what they had sworn. But the Court will not deny to the defendants this presumption so venerated as one of the basic safe guards of our way of life in this Republic. In *Coffin* v. *United States*, 156 U. S. 532, this Court held that "the principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary,

and its enforcement lies at the foundation of the administration of our criminal law."

In that case, Mr. Justice White pointed out that this presumption was traceable to Deuteronomy, that it was substantially embodied in the laws of Sparta and Athens and that the Roman law was pervaded with this maxim of criminal administration. He traced the principle through the English law and showed how it is one of the main foundation stones of the liberties of our peoples. It is not necessary to trace the holdings of this Court on so palpable a point. The application of the rule to the testing of the sufficiency of an indictment subjected to demurrer (motion to dismiss) is well set forth by the Court of Appeals for the Eighth Circuit in *Lynch* v. *United States*, 10 F. (2) 947, 949:

> "Where one is indicted for a serious offense, the legal presumption is that he is not guilty; that he is ignorant of the supposed facts upon which the charge is founded. A demurrer to the indictment must be considered and determined on that presumption, on the presumption that the defendant does not know the facts, that the prosecutor thinks make him guilty . . ."

The same court, in *Keller* v. *United States*, 133 Fed. 337, again stressed the presumption of ignorance and further defined the nature of the presumption:

> "He [the defendant], is unable to secure and present the evidence in his defense . . . unless the indictment clearly discloses the facts upon which the charge of the commission of the offense is based. It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he is to meet, so fully as to give him a fair opportunity to prepare his defense, . . . and so clearly that the court, upon an examina-

tion of the indictment, may be able to determine whether or not, under the law, the facts there stated are sufficient to support a conviction. *United States v. Hess*, 124 U. S. 483, 486, 487, 488."

In 16 Corpus Juris 530, Criminal Law, Par. 1015 (2) it is stated: "In accordance with the presumption of innocence, accused is presumed to be ignorant of what is intended to be proved against him, except as laid in the indictment." To the same effect, see *Sutton v. United States* (Fifth Circuit), 157 F. (2) 661, *Fontana v. United States*, 262 Fed. 283 and the other authorities cited, *supra*.

"Legislation may proceed by implication but good pleading may not," so stated the court of the Fifth Circuit in *Robertson v. United States*, 108 F. (2) 294. Substantially the same thing was said in *United States v. Carll* and *United States v. Hess, supra*.

The shortage of printer's ink does not seem to have coincided with the passage of Rule 7(c). The government set forth the necessary details in the *Bickford* case and in the *Meyers* case and others and did not give itself over to indictment by implication until after the Rules of Criminal Procedure had gone into effect.

The use of the word "competent" can not buttress the indictment as the court will look to the fact charged, that the "tribunal" was a Senate sub-committee and will reach its own conclusion from that *fact*. The same is true of the use of the adverb "duly." The use of that word connotes that the draftsman of the indictment looked upon certain supposed facts, and concluded that they spelled out such propriety and legality of action that he could set them forth by the use of that word, withholding the facts for which the adverb essayed to stand. The law requires that the *facts* appear in the indictment so that the defend-

ant may know them and that the court may judge them. That is the very genius of Rule 7(c).

In *Fontana v. U. S.*, 262 F. 283 (C. C. A. 5, 1919), the court said (at p. 286):

> "When one is indicted for a serious offense, the presumption is that he is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charge, and it is a fundamental rule that the sufficiency of an indictment must be tested on the presumption that the defendant is innocent of it and has no knowledge of the facts charged against him in the pleading."

The presumption that a defendant is not only innocent but that he has no knowledge of the facts constituting the crime with which he is charged means, when applied to a charge of perjury, that the defendant does not know that he was sworn at all. Accordingly, he must be told the identity or office of the human being who swore him so that he can ascertain the facts charged against him.

The same principle is followed in other essential parts of an indictment. The question of venue is an apt example. The crime must be laid within a certain jurisdiction. Why is that necessary? Surely a man charged with murdering Jim Jones does not have to be told where the murder was committed if it is proper to assume any knowledge as to the alleged murder on his part? Yet venue is one of the essential facts. So is the name of the person murdered. Certainly, a man charged with the crime of murder would know the identity of the person he murdered, had he, in fact, committed the crime. Nevertheless, he must be told the name of that person in the indictment.

The reason for these requirements in the cases of venue and of the name of the person murdered is clear. The indictment cannot assume guilt on the part of the accused. The presumption of innocence necessarily imports the cor-

related presumption of total lack of knowledge of any of the elements of the offense charged. Thus, the Government is in error in contending that the indictments herein could properly dispense with showing on their face the identity and authority of the person administering the oath. No knowledge can be imputed to the defendants so as to overcome the fatally defective omissions in the indictments.

IV

Effect of Repeal of R.S. 5396 (28 U.S.C. 556)

1. The Government argues that, by reaching back to a repealed statute (R. S. 5396, which required a perjury indictment to allege "before whom the oath was taken") to determine the sufficiency of an indictment as a pleading, the holding below has imported into modern criminal pleading outworn *technical* concepts which the Rules of Criminal Procedure were intended to abolish. But a review of the history of R. S. 5396 will show that the court has certainly not reached back to a repealed statute but has simply given effect to accepted principles of modern pleading.

It is clear that perjury historically had become so encrusted with details, prior to enactment of 23 Geor. II, Chap. 11, that indictments for perjury were being dismissed on grounds that did not go to the substance of the offense, but instead to the omission of evidentiary details. This process of encrustation with unnecessary and merely formal detail is well described in Chitty, Criminal Law, Vol. II, 5th Amer. Ed. (1947), Ch. IX, Perjuries, at p. 306:

> "Indictment.—In former times, indictments for perjury were exceedingly prolix and dangerous. Thus, an information on the Statute of Elizabeth, set forth the statute itself, the pleadings in an action of ejectment, the issue joined, the proceedings on the trial, the whole

evidence and the assignment of perjury upon it. Co. Ent. Inform. 367. But, in order to facilitate prosecutions for perjury, which have frequently been unsuccessful in consequence of formal defects, it was enacted by 23 Geo. 2, Ch. 11, that in every indictment and information for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath was taken (averring such court or person or persons to have a competent authority to administer the same * * *."

Thus, the English statute was passed to limit perjury to the essential elements of the crime. As Chitty states (p. 307), "The substance of the charge is intended in opposition to all its details". Our American statute (28 U. S. C. 558) adopted the English statute.

Instead of stating what elements were required to constitute the crime of perjury, Section 558 limited itself to stating that "it shall be sufficient to set forth" stated elements of the crime. The statute thus merely set forth the minimum essentials of a valid indictment for the crime of perjury, thereby enabling prosecutors to determine what immaterial facts could safely be omitted from the averments of the indictment.

In thus restating the minimum constituents of a valid indictment for perjury, the statute long served a useful purpose. That function lost its significance when Rule 7(c) of the Federal Rules of Criminal Procedure was adopted.

Rule 7(c) sets forth as a rule of general application to all criminal statutes, the same principle that had heretofore been set forth specially for perjury alone in Section 558, i.e., that it is sufficient in an indictment to state the essential facts constituting the offense charged.

Of course, the repeal of a statute whose only mission was to minimize the requirements of an indictment does not

carry the presumption that those minima were thereby further diminished. It is more logical to conclude that Congress considered it no longer needed a separate statute having special application only to the crime of perjury when it had a general statute which performed precisely the same function for all criminal offenses, and therefore necessarily applied also to the crime of perjury.

The prime efficacy of 28 U. S. 558 lay in the things it permitted the government to leave out of an indictment. It granted leave that an indictment might contain the substance of the materiality of the false swearing, omitting the details, and might omit entirely the pleadings and record of proceedings and the commission of the person before whom the oath was taken.

It is rather to be assumed, therefore, that Congress felt free to leave that statute out of the revised code because it was assured that the courts would, under Rule 7(c), grant to the government the right to omit from the indictment those things which the language of the statute had stamped as non-essential.

There is no ground at all for the assumption that Congress intended that the courts applying Rule 7(c) should exempt the government from the necessity of charging all of the essential facts of perjury which had been accepted as standard throughout the life of the nation, and which Section 558 recognized as established substantive law.

2. The most significant thing that can be said of Section 558 is that its acceptance of the requirement that a perjury indictment must set forth "by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same," and its re-enactment unchanged for more than a century and a half, helped to crystalize the quoted requirement into a principle of law of universal acceptance.

3. There is no merit, therefore, to the government's contention that the omission of Section 558 from the recodification of 1948, and that the supposed substitution of Rule 7(c) for it carries the presumption that Congress intended to reject entirely the legal principle so long recognized by the statute. Quite the contrary is true under the holding of this Court in *Morissette v. United States*, 342 U. S. 246, 96 L. Ed., 288.

Under consideration there was the effect of the omission of *intent* from the recodification of the law against embezzlement, larceny, and similar crimes which Congress had effected in the new statute, 18 U. S. C. 641. Morissette had contended that "both the indictment and the statute require proof of felonious intent". The Court of Appeals of the Sixth Circuit rejected that contention, 187 F(2) 427, 428, holding that it was the manifest purpose of Congress to drop *intent* as an ingredient of the offense. That Court held the indictment good under Rule 7(c), feeling that "the federal courts long ago abandoned the course of reversing convictions for crime on the technical niceties of pleadings".

This Court reversed, using language of similar import to that employed by the District Court in its opinion in this case (R. 13):

> "As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle, but merely recognized that intent was so inherent in the idea of the offense that *it required no statutory affirmation* . . .
>
> "And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken, and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case,

absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them . . ."

The elements of perjury long construed in accordance with the provisions of Section 558 remain the same when it is to Section 7(c) of the Federal Rules of Criminal Procedure that one turns instead for the controlling standard for sufficiency of the perjury indictment. As Mr. Justice Frankfurter has observed:

> "Words of art bring their art with them. They bear the meaning of their habitat whether it be a phrase of technical significance in the scientific or business world, or whether it be loaded with the recondite connotations of feudalism. Holmes made short shrift of a contention by remarking that statutes used 'familiar legal expressions in their familiar legal sense'. The peculiar idiom of business or of administrative practice often modifies the meaning that ordinary speech assigns to language. And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Frankfurter, "Reading of Statutes", 47 Col. L. Rev. 527, 536 (1947).

V

The Government Misconstrues the Purpose and Effect of Rule 7(c)

1. Rule 7(c) is not entitled to be construed as having an effect as cataclysmic as that with which the government seeks to invest it. It did not spring "full-fledged" from the mind of Congress as Pallas is reputed to have sprung from the head of Jove. It is rather the synthesis of its prototype, 18 U. S. C. 556, plus the evolution wrought by the courts under it. This Court had long since sanctioned a departure from "the rigor of old common law rules of criminal pleading" in a line of cases of which *Hagner* v.

United States, 285 U. S. 427, 76 L. Ed. 861, is an example. The Court of the Fifth Circuit had been in the forefront of those which were studious to deny to defendants "A vested right in the veteran absurdities of criminal procedure"; *Whitehead* v. *United States* (1917) 245 F. 385. And see *Wilson* v. *United States* 158 F (2) 659; cert. den. 330 U. S. 850; *Robertson* v. *United States*, *supra*, and *Parsons* v. *United States*, 189 F. (2) 252.

Moreover the Government suggests a meaning for Rule 7(c) which its framers expressly disavowed. Rule 7(c) was designed to eliminate prolixity of pleading and ancient encrustations which prosecutors were fearful of eliminating. By its very language, however, the rule expressly requires that all of the essential facts of the crime charged must be alleged. In addition, those who took part in the framing of the rule made it clear that there was no intention of adopting the so-called "short form" of indictment.

Thus, the Government relies heavily on Holtzoff, *Reform of Federal Criminal Procedure*, 3 F.R.D. 445, 448-449. Judge Holtzoff there states merely that the intention of Rule 7(c) is the "simplification of indictments and informations" since the "prolix and archaic form of indictment couched in Elizabethan English is still used in the federal courts. Actually, instead of apprising the defendant of the crime of which he is accused, an indictment of this sort tends to mystify him." (At p. 448). Judge Holtzoff emphatically emphasizes that this simplification satisfactorily meets the rigid test of the:

> ". . . necessity of preserving and safeguarding the fundamental rights of the accused. These rights, which are derived from the basic Anglo-Saxon principles of fair play and are in part embodied in the Constitution of the United States, are intended, first, to protect the innocent against an erroneous conviction, and, second,

to assure the use of civilized standards in dealing even with the guilty." (At p. 446).

And Judge Holtzoff states further at page 447:

"The simplification of procedure has been accomplished, however, without sacrifice of any safeguard that properly surrounds a defendant in a criminal case."

Clearly, an averment held necessary by this Court in *U. S. v. Hall, supra*, and *U. S. v. Markham, supra*, as well as by every federal appellate court which has spoken on the subject, and by innumerable state courts, is a safeguard surrounding a defendant that, under any use of language, comes within this assurance by Judge Holtzoff.

An essential part of the Government's argument is that the identity and authority of the person administering the oath can be properly provided by a bill of particulars. Judge Holtzoff, however, made it plain that Rule 7(c) does not envisage that type of indictment. He said at page 449:

"The form adopted by the committee is not what is technically known as the short form indictment, which merely names the crime with which the defendant is charged, by its legal term, without specifying or summarizing the facts of the offense. The Committee deliberately rejected indictments of this type, because they are apt to *evoke motions for bills of particulars and thereby constitute a source of unnecessary delay.* A simple indictment, briefly and succinctly setting forth the facts of the specific crime, seems preferable."

Precisely to the same effect is the comment by Arthur T. Vanderbilt, Chairman of the Advisory Committee. See, Vanderbilt, 29 A.B.A. Jour. 376, 377 (1943):

"A simple form of indictment is proposed which constitutes a compromise between the present prolix

document and the extremely short form. The objection to the latter is that it almost invariably evokes a motion for a bill of particulars and *thereby is productive of delay*. The form preferred by the committee is one that states the essential facts constituting the offense but omits the formal averments and useless embellishments with which old-time draftsmen have been wont to adorn their product."

Homer Cummings stated (29 A.B.A. Jour. 654 (1943)):

"The framing of a set of rules of criminal procedure is a difficult business. The protection of the individual members of society against crime is one of the fundamental purposes for which government exists; and yet that purpose cannot be adequately served if the mechanism of justice is out of joint. For many years, useless and archaic technicalities, the product of a bygone day, have delayed and hampered and at times even frustrated the successful administration of the criminal law. While concerning ourselves with efficiency and expedition, great care must be taken to avoid the impairment of any of the just rights of the accused. Naturally, this protection must be in accord with the fundamental concepts of Anglo-American jurisprudence, which surrounds the defendant in a criminal case with certain well-defined safeguards."

George H. Dession, in *The New Federal Rules of Criminal Procedure*, II, 56 Yale L. J. 197, 206 (1947), states:

"The Rule [Rule 7(c)] does not institute the 'short form' type of pleading sanctioned in some of the states, which presupposes the furnishing of a bill of particulars to round out the minimum of information to which a defendant is entitled before being called upon to plead. *The pleading here contemplated would be complete in itself.*" (Emphasis supplied.)

William W. Barron says in Proceedings of the Institute on Federal Rules of Criminal Procedure, held at the Catholic University School of Law, 5 F.R.D. 150, 152:

> "The sufficiency of the accusation is to be tested in the light of the presumption that the accused is innocent and without knowledge of the facts charged. [Citing *Fontana* v. *U. S.*, 262 F. 283 (C.C.A. 8, 1919).]
>
> "The indictment or information must set forth every ingredient of the offense with sufficient clearness, precision and certainty to apprise the accused of the crime charged, to enable him to prepare his defense, and to permit him to assert the judgment in bar of a subsequent prosecution."

And Mr. Barron states at page 154:

> "In conclusion, it may be truthfully said that the Rules relating to the grand jury and to indictments and information are in principle substance but a restatement and simplification of existing procedural law. Those changes which have been noted could all have resulted from enlightened judicial interpretation of existing provisions of law."

George Z. Medalie states (Federal Rules of Criminal Procedure with Notes and Institute Proceedings, N. Y. U. School of Law, Proceedings, Vol. VI (1946) p. 157:

> "Now I don't think we said anything new in telling how an indictment or information may be drawn. You would think from the fact that we said it that we invented a new way for drawing up indictments or informations. Rule 7, subdivision (c) says that the indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged. Now, it could always be that. There was never a time when it couldn't be. • • • I don't know whether we can succeed except by moral suasion in getting the indictment to be con-

cise and definite, instead of prolix, verbose, and involved. * * *"

It is clear beyond dispute from consideration of these authoritative statements that Rule 7(c) represents for the entire body of criminal law, what 23 Geo. II, Chap. 11, and Rev. Stat. 5396, 18 U.S.C. 558, represented for the special crime of perjury. Rule 7(c), similarly to Section 558, sanctions the elimination of verbose, prolix and wordy statements of evidentiary facts. It does no more than that. It does not sanction the Government's position that the identity and authority of the party administering an oath have ceased to be among the essential facts constituting the offense.

Nor can the Government successfully allege that these cases were overruled because Section 558 was repealed without comment after the adoption of Rule 7(c) as part of the general recodification of Title 18 of the United States Code. The simple answer to the repeal of Section 558 is that it was recognized that it had become unnecessary because Rule 7(c) provided *for all federal criminal statutes what Section 558 had provided for a perjury indictment.* The general includes the particular; a specific statute for a particular crime was no longer necessary.

All that is necessary to harmonize the entire legislative history of these changes in federal criminal procedure is to take the common sense view that the revisers of Title 18 concluded that a particular provision as to sufficiency of perjury indictments (Section 558) was no longer necessary in view of the fact that Rule 7(c) similarly upheld the validity of indictments for all criminal offenses which stated the substance of the offense. This is a far cry indeed from concluding that the repeal of Section 558 meant that the

Government had a free hand in eliminating averments held necessary under Section 558.

2. If the Government's position as to the meaning of Rule 7(c) is to be taken seriously, the question arises, what other elements of the crime can be eliminated?

We note the Government's assurance in its brief that:

> "It is, of course, still essential under Rule 7(c) and the perjury statute that the indictment allege that the oath was taken before proper authority. If the oath was taken before a court the particular court should be specified; if before a tribunal of some other kind, the nature of the tribunal and its authority; and if before a person, his official capacity and authority."

But if the Government's position respecting the alleged permissibility of omitting any averment in the indictment as to the identity and authority of the person administering the oath has any validity, why, by the same logic, is it necessary to specify before what tribunal the oath is taken? Why, in a whole series of crimes, is it not then possible for indictments to become highly generalized statements devoid of fact, in reliance on the argument that since the indictment charges commission of a crime, the details of the alleged crime may be presumed? But this is precisely the short form of indictment which the framers of Rule 7(c), for constitutional or other reasons, expressly determined to avoid.

Approval of the strained construction of Rule 7(c) by the Government which purports to find validity in indictments which proceed by presumption and implication will not only deny constitutional rights to the particular defendants herein, but will inevitably open the door to further weakening of the safeguards historically surrounding indictments. Those safeguards are for the protection of

the innocent equally with the guilty. As this Court stated in *Edwards* v. *U.S.*, 312 U.S. 473, 483 (1941):

> "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. * * *"

Conclusion

It would be a mistake to approach this case with the notion that its affirmative will be an acknowledgment that "we are still enmeshed in the technicalities of common law pleading". Quite the contrary is true, and respondents rely confidently on the function and spirit of Rule 7(c). What the Court is called upon to do here is to define what are the ingredients of the crime of perjury and to test whether the *facts* spelling out those ingredients are set forth in the indictment.

The fundamental error of the draftsmen of this indictment is that he failed to grasp that the perjury statute covers two categories: false swearing in the presence of a tribunal of such character as would invest with legality any oath given "before" it; and false swearing in the presence of one person or a group of persons where the oath is required to be administered by an "officer or person" vested by statute with authority to administer it.

Congressional committees belong in the latter category because no statute clothes them with power to administer an oath or to cause it to be administered by some person whose giving of the oath is made legal solely because he gives it "before" the committee (such as is true of courts of justice). The sole source of power is 2 U. S. C. 191 which vests individual senators alone with the power to swear witnesses, thus classifying this proceeding as belonging in the "officer or person" category and not in the "tribunal" category.

The two divisions of the perjury statute are of equal dignity and efficacy. It would have been simple indeed to charge that the defendant was sworn by a named senator who was vested with authority to act because he was functioning as a member of a properly constituted committee. Many words would have been saved if the prosecutor had

grasped that simple difference. And the constitutional rights of the defendant would have been preserved.

And the spirit of Rule 7(c) would have been served well. The basic requirement of that rule is "facts",—not conclusions or inferences. Decisions under the older statute had spoken of essential elements and essential ingredients. But the rule supplanting them chose a simpler word, facts. Because the prosecutor chose to involve the defendant and the court in the complexities incident to unraveling the implications of such terms as "competent" and "duly" instead of setting forth simply the *facts* as to who gave the oath and by what authority, the court below rightly struck down the indictment and the case should be affirmed.

Respectfully submitted,

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